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No. 71-750

In the Supreme Court of the United States

OCTOBER TERM, 1971

NATHAN T. WOLKOMIR, AS PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ET AL., PETITIONER

v.

FEDERAL LABOR RELATIONS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion and judgment of the district court (Pet. App. 2a–7a, 8a–9a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1971 (Pet. App. 1a). On November 4, 1971, Mr. Chief Justice Burger extended the time within which to file a petition for a writ of

certiorari to December 8, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to interfere with the decision of the President to terminate recognition by the Executive Branch of federal-employee minority unions, and to discontinue the withholding of union dues from the compensation of employees who were members of such unions.

STATUTES, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

Title 5, section 7301, United States Code, reads as follows:

> The President may prescribe regulations for the conduct of employees in the executive branch.

Title 5, subchapter III, section 5525, United States Code, provides as follows:

> The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate.

Title 5, subchapter III, section 5527, United States Code, provides in pertinent part as follows:

> (a) To the extent practicable in the public interest, the President shall coordinate the policies and procedures of the respective Executive agencies under this subchapter.
>
> (b) The President, with respect to the Executive agencies * * * shall prescribe and issue, or

provide for the formulation and issuance of, regulations necessary and appropriate to carry out the provisions, accomplished the purposes, and govern the administration of this subchapter.

Executive Order 11491 (1969), 34 Fed. Reg. 17605, provides in pertinent part as follows:

* * * * * * *

Sec. 21. *Allotment of dues.* (a) When a labor organization holds formal [minority] or exclusive [majority] recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. * * *

* * * * * * *

Sec. 24. Savings clauses. * * *

* * * * * * *

(c) All grants of formal [minority] recognition under Executive Order 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970.

* * * * * * *

Regulations of the Federal Labor Relations Council, 5 C.F.R. 2412.7 and 2412.8, as amended, provide that grants of formal [minority] recognition shall terminate not later than July 1, 1971.

STATEMENT

Petitioner, as president of the National Federation of Federal Employees (NFFE), a government-em-

ployee labor union, commenced this action in the United States District Court for the District of Columbia on behalf of NFFE and its local unions, seeking to enjoin the enforcement of regulations issued by respondent Federal Labor Relations Council terminating, as of July 1, 1971, the withholding of dues of members of minority federal-employee unions. He argued that such a termination was contrary to the relevant federal statute (5 U.S.C. 5525) and, because it did not apply to members of majority unions, constituted an invidious discrimination in violation of the First and Fifth Amendments. The district court concluded that it lacked subject matter jurisdiction and dismissed the complaint (Pet. App. B, pp. 2a–6a).[1] The court of appeals affirmed *per curiam* (Pet. App. A, p. 1a).

Agency recognition of both majority and minority government-employee unions was first authorized by Executive Order 10988 in January 1962 (Pet. App. E, p. 12a).[2] The Executive Order, however, said nothing with respect to dues withholding for members of such

[1] The complaint in *American Federation of Government Employees* v. *Hampton*, D.D.C., Civ. No. 1428–71, was also dismissed. There, the plaintiff argued that the July 1, 1971, cut-off date should be extended in those cases where an election proceeding was still in progress. The district court concluded that it was without subject matter jurisdiction to review that question (Pet. App. C, pp. 8a–9a) and the court of appeals affirmed *per curiam* (Pet. App. D, p. 10a). The determination in that case is not challenged in this petition.

[2] This Executive Order (27 Fed. Reg. 551) was issued pursuant to the President's authority in 5 U.S.C. 7301 to "prescribe regulations for the conduct of employees in the executive branch." The term "exclusive recognition" was used therein to

unions. Upon an inquiry by the Civil Service Commission (Pet. 11), the Comptroller General ruled in January 1963, that under the applicable statute (5 U.S.C. 3075), the Commission could promulgate regulations "permitting employees to authorize allotments from their compensation (payroll deductions) for the purpose of paying their union dues * * *" (42 Comp. Gen. Dec. 342, January 7, 1963).[3] The Commission then issued regulations authorizing federal agencies to enter into dues withholding agreements with employee organizations having either minority or majority recognition under Executive Order 10988, thereby permitting union employees to make voluntary allotments out of their compensation for the payment of union dues (5 CFR (1964 ed.) 550.304 and 550.305; 28 Fed. Reg. 10993).

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define the recognition to be given a labor organization selected as the representative by a majority of employees in an appropriate unit; the term "formal recognition" was used to define the recognition to be given a labor organization selected to represent not less than 10 percent of the employees in an appropriate unit (where the unit was not already represented by a majority union). See E. O. 10988, sections 5(a) and 6(a). These same terms were later used in Executive Order 11491, which is under attack in the instant case. See E. O. 11491, section 10(a). The terms "majority" and "minority" are used herein instead of the terms "exclusive" and "formal."

[3] The Comptroller General stated (42 Comp.Gen.Dec. 343): "The language of section 5 of the act of September 26, 1961 [5 U.S.C. (1964 ed.) 3075; now 5 U.S.C. 5525] * * * would permit allotments and assignments of compensation for such purposes as the department head deems appropriate—subject to the regulatory authority of the President which in turn has been delegated to the Civil Service Commission by section 2(b) of Executive Order No. 10982."

In 1969, a special interagency review committee appointed by the President to study federal labor-management relations, recommended that federal recognition of minority unions be terminated. It pointed out that while "this type of recognition was a reflection of what was common practice in labor relations in the Government" at the time of issuance of Executive Order 10988 in 1962, the "prevailing form of recognition [in 1969] is exclusive [majority]." *Report and Recommendations on Labor-Management Relations in the Federal Service*, pp. 33–34 (August 1969) ("Report"). Due primarily to the rapid growth of union representation over the intervening 7-year period, the committee noted, recognition of minority unions "in recent years * * * has produced problems which hinder the development of stable and orderly labor relations. It has contributed to excessive fragmentation of units, confusing and overlapping relationships, and difficulties in maintaining an appropriate difference in the rights and obligations under [minority] recognition compared with those prescribed for [majority recognition]" (*ibid.*). In conclusion, the committee stated (*Report*, p. 34): "Clearly, employees and labor organizations no longer need the special assistance in organizing provided by formal [minority] recognition, and its continuance is not warranted in view of the problems involved in administering multiple forms of recognition. Accordingly, we recommend that the granting of formal [minority] recognition be discontinued at this time."

On the basis of the August 1969 Report and Recommendations, the President, pursuant to his authority under 5 U.S.C. 7301 (see n. 2 *supra*), issued Execu-

tive Order 11491 (34 Fed. Reg. 17605) on October 29, 1969, to become effective as of January 1, 1970. This order revoked Executive Order 10988 and prescribed new policies governing labor-management relations for federal employees. Insofar as is here relevant, the new Executive Order provided that "[f]ormal [minority] recognition, including formal [minority] recognition at the national level, shall not be accorded after the date of this Order" (E.O. 11491, section 8(a)). Moreover, "all grants of formal [minority] recognition under Executive Order 10988" were to be "terminate[d] under regulations which the Federal Labor Relations Council will issue before October 1, 1970" (E.O. 11491, section 24(c)). With respect to the withholding of union dues from federal employees' compensation, Executive Order No. 11491 authorized such payroll deductions if "the agency and the association agree in writing to this course of action" (section 21 (b)); however, it provided that "[s]uch an allotment is subject to the regulations of the Civil Service Commission * * *" (section 21(a)).

Proposed regulations were announced by the Council and the Commission in September 1970; following public hearings, the regulations were issued in final form in February 1971. Essentially, they set July 1, 1971, as the date for termination of minority recognition (5 CFR 2412.7 and 2412.8, 36 F.R. 2909, 2910). In addition, they specified that the withholding of dues of members of minority unions would continue only "so long as the organization continues to hold formal [minority] recognition" (5 C.F.R. 550.310, 35 Fed. Reg. 16310; and see 5 C.F.R. 550.304 and 550.305, 35 Fed. Reg. 16309).

ARGUMENT

1. Petitioner argues here, as he did below, that the termination of minority recognition, and the attendant loss of dues withholding privileges to members of minority unions, is contrary to 5 U.S.C. 5525. That statute, however, provides only that: "The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate." As the district court pointed out (Pet. App. 5a), the language "is purely permissive. Congress has not affirmatively directed dues check-offs."[4]

Accordingly, Executive Order 11491, and the regulations promulgated thereunder, do not deprive members of minority unions of any statutory rights. The withholding of union dues is a privilege. It became available to federal employees in minority unions by virtue of Executive Order 10988 and the Comptroller General's ruling thereunder. When circumstances some years later warranted a revocation of that Order, the consequent termination of that privilege by the President was entirely appropriate under the statute. And see 5 U.S.C. 5527.

The President followed appropriate procedures in taking such action. Before issuing Executive Order 11491, he appointed a special interagency review commission to make a thorough study of federal labor-management relations; its recommendation was the

[4] The withholding of union dues from an employees' compensation is generally referred to as a "check-off" (Pet. 4 n. 2).

basis for the decision to terminate minority recognition and the attendant dues withholding for members of minority unions (*supra*, p. 6). That decision was, as the district court noted, "entirely reasonable and proper" (Pet. App. 4a). There is thus no reason for judicial intervention "with the discretion of the Executive in his handling of a matter so peculiar to the Executive, namely, the labor activities of employees of the Executive departments" (Pet. App. 5a). See *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451, 457 (C. A. D.C.), certiorari denied, 382 U.S. 978.

2. Petitioner seeks to avoid this conclusion by alternatively casting his argument in constitutional terms. He claims that a termination of recognition to minority, but not majority, unions constitutes an invidious discrimination under the Fifth Amendment, and impermissibly interferes with the right of government employees to join a union of their choice under the First Amendment.

But the distinction between minority and majority unions has been recognized in private industry for several decades as a guiding principle of labor-management relations. Under sections 8(a) and 9(a) of the National Labor Relations Act (29 U.S.C. 158(a) and 159(a)), for example, an employer is obliged to recognize and bargain with only a duly-elected majority union, and is not permitted to bargain contemporaneously with minority unions. There is, of course, no constitutionally-protected right to recognition of minority unionization. As the district court properly observed, that "is a right that is granted by grace

and it is within the province of the Legislature and the President to determine the limits of that right and how it should be exercised" (Pet. App. 6a). Here, the determination was made after an exhaustive study of federal labor-management relations; there was a rational basis for termination. Petitioner has no valid complaint of a deprivation of Fifth Amendment rights. Cf. *Flemming* v. *Nestor*, 363 U.S. 603, 611.[5]

Nor is there any more substance to his First Amendment claim. Essentially, petitioner argues that because minority unions are no longer entitled to federal recognition, and members cannot have their dues withheld, federal employees will be "forced to join a union not of their choice, but rather one which has exclusive [majority] recognition" (Pet. 22). But, there is nothing in Executive Order 11491, or the regulations promulgated thereunder, to support such a conclusion. Federal employees are as free now as they were prior to the termination of federal recognition to join minority unions. Indeed, they are in substantially the same position in this regard that they were in ten years ago, before federal-employee unions had received any agency recognition.

The fact that withholding privileges are not now available to members of minority unions does not

[5] To the extent that petitioner is contending that termination of dues withholding deprived him of property without due process of law, the claim is without merit. At most, members of minority unions have lost nothing more than a government service on their behalf (one which the unions themselves paid for). The termination of such a service is not a constitutional deprivation of property. The union is still free to collect its own dues.

make a difference. Union dues still must be paid and minority unions remain free to collect their own dues. Accordingly, petitioner's contention that, because of termination of the recognition once afforded to such unions, federal employees are being "actively discouraged and hindered" from joining them (Pet. 22) is not well taken.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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